Supreme Court, U.S.
FILED
DEC 14 2001

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILEY GENE WILSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Are a defendant's constitutional rights violated when a sitting United States Attorney in one district acts with vindictive motives in referring a matter for prosecution and an indictment is obtained without any further factual investigation by the federal prosecutors who act upon the referral?

2. Should appellate courts give deference to a district court's determination that the facts before it warrant a presumption that a prosecution was tainted by a vindictive animus?

3. Should appellate courts review de novo a district court's discovery order that requires the prosecutor to explain whether the charging decision was tainted by vindictive motives?

II. PARTIES

All the parties to the proceedings below are identified in the caption of this case.

III. TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. PARTIES ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES iv

V. OPINIONS BELOW 1

VI. JURISDICTION 1

VII. CONSTITUTIONAL PROVISIONS 1

VIII. STATEMENT OF THE CASE 1

IX. ARGUMENT 5

X. CONCLUSION 14

IV. TABLE OF AUTHORITIES

Federal Cases

Berger v. United States, 295 U.S. 78 (1935) 7

Blackledge v. Perry, 417 U.S. 21 (1974) 10

Giglio v. United States, 405 U.S. 150 (1972) 7

S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972) 7

Simmons v. United States, 390 U.S. 377 (1968) 13

Thigpen v. Roberts, 468 U.S. 27 (1984) 8

United States v. Adams, 870 F.2d 1140 (6th Cir. 1989) 6

United States v. Armstrong, 517 U.S. 456 (1996) 12

United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992) 11

United States v. Bullis, 77 F.3d 1553 (7th Cir. 1996) 8

United States v. Gamez-Orduno, 235 F.3d 453 (9th Cir. 2000) 11

United States v. Graham, 146 F.3d 6 (1st Cir. 1998) 11

United States v. James, 257 F.3d 1173 (10th Cir. 2001) 12

United States v. Johnson, [illegible] 3d 695 (5th Cir. 1996)..... 8

United States v. Jones, 159 F.3d 969 (6th Cir. 1998)..... 11

United States v. Koh, 199 F.3d 632 (2d Cir. 1999)..... 5, 8

United States v. Meyer, 810 F.2d 1242 (D.C. Cir. 1986)..... 8, 9

United States v. Monsoor, 77 F.3d 1031 (7th Cir. 1996)..... 6

United States v. Montoya, 45 F.3d 1286 (9th Cir. 1995)..... 9

United States v. Olvis, 97 F.3d 739 (4th Cir. 1996)..... 11

United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992)..... 6

United States v. Parham, 16 F.3d 844 (8th Cir. 1994)..... 11

United States v. Perez, 79 F.3d 79 (7th Cir. 1996)..... 9, 10

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997)..... 11

United States v. Sanders, 211 F.3d 711 (2d Cir. 2000)..... 6, 11

United States v. Schoolcraft, 879 F.2d 64 (3d Cir. 1989) 6, 8

United States v. Wall, 37 F.3d 1443 (10th Cir. 1994) 8

United States v. Woods, 36 F.3d 945 (10th Cir. 1994) 9

Federal Statutes

28 U.S.C. § 1254(1) 1

18 U.S.C. § 922(g)(1) 1

V. OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-33) is reported at 262 F.3d 305. The bench order of the district court (App., infra, 34-38) dismissing the indictment is not reported. The order of the district court denying the United States' motion for reconsideration of the dismissal of the indictment (App., infra, 39-52) is reported at 120 F. Supp. 2d 550.

VI. JURISDICTION

The judgment of the court of appeals was entered on August 16, 2001. A petition for rehearing was denied on September 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

VIII. STATEMENT OF THE CASE

On April 2, 1997, Mr. Wilson was convicted in the District of South Carolina for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). While the appeal of his conviction was before the Fourth Circuit, Mr. Wilson was transferred from the Federal Correctional Institute at Butner, North Carolina to Las Vegas for trial on state charges pending in Nevada.

Following the disposition of these state charges, jailers in Clark County Nevada, apparently due to a mix-up in paperwork, released Mr. Wilson from custody on December 15, 1998. On January 6, 1999, Mr. Wilson was located by federal marshals and returned to federal custody. Following his return to custody, a United States Marshal for the Eastern District of North Carolina relayed the circumstances of Mr. Wilson's release from custody to the duty attorney with the United States Attorney for the Eastern District of North Carolina. At that time, the Marshal's Office was informed that the office of the United States Attorney for the Eastern District of North Carolina did not intend to pursue an indictment of Mr. Wilson for escape.

On March 7, 2000, well over a year later, the United States Court of Appeals for the Fourth Circuit reversed the South Carolina conviction in an en banc decision. 98 F.3d 1336. The day after the South Carolina conviction was reversed, a flurry of activity began that quickly resulted in Mr. Wilson being indicted for escape based upon his inadvertent release from prison one and a half years earlier.

On March 8, 2000, fax transmissions began between the District of South Carolina and the Eastern District of North Carolina concerning the circumstances of Mr. Wilson's purported escape. Within a week of the Fourth Circuit's decision, the sitting United States Attorney for the District of South Carolina sent an email to the sitting United States Attorney for the Eastern District of North Carolina, personally requesting that the Eastern District of North Carolina indict Mr. Wilson for

escape based upon the erroneous release. In this personal plea, the United States Attorney for the District of South Carolina made misleading and false statements regarding Mr. Wilson to induce the Eastern District of North Carolina to act.

In response to this personal plea, the United States Attorney for the Eastern District of North Carolina took swift action. On March 30, 2000, Mr. Wilson was served with a criminal complaint. Mr. Wilson was indicted by the grand jury on April 17, 2000 for escape (18 U.S.C. § 751(a)).[1] Only after an indictment was obtained did North Carolina federal prosecutors conduct an investigation of the actual facts of the erroneous release. On May 17, 2000, a superceding indictment was issued to correct the numerous factual errors in the original indictment.

Mr. Wilson moved to dismiss the indictment on the grounds that the escape prosecution was brought in violation of the Fifth Amendment to the United States Constitution due to a vindictive animus held by federal prosecutors. On August 1, 2000, the District Court ordered federal prosecutors to testify at an evidentiary hearing with respect to the decision to charge Mr. Wilson. The United States refused to comply with the District Court's order.

On August 14, 2000, the District Court judge conducted an evidentiary hearing on the merits of

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[1] The jurisdiction of the District Court is established by 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals is established by 28 U.S.C. § 1291 and 18 U.S.C. § 3731.

Mr. Wilson's vindictive prosecution claim. During that hearing, the Government's own witness admitted that the circumstances surrounding the indictment of Mr. Wilson were "unusual." At the conclusion of the evidentiary hearing, the district court concluded that the decision to charge Mr. Wilson with escape was motivated by a desire to punish him for the successful appeal of the South Carolina conviction. In its ruling, the District Court found that various statements made by the sitting United States Attorney in South Carolina (and accepted as fact by North Carolina prosecutors) were false. For example, although the South Carolina United States Attorney informed North Carolina prosecutors that Mr. Wilson was dangerous and had threatened the sentencing judge, the District Court found as a fact that this allegation had no credible support. Following a motion for reconsideration filed by the United States, the District Court expressly held that the factual circumstances surrounding Mr. Wilson's indictment gave rise to a presumption of vindictiveness that had not been rebutted by prosecutors.

On August 16, 2001, the Fourth Circuit reversed the District Court's order dismissing the indictment. The Fourth Circuit applied a de novo standard of review to both (1) the District Court's order allowing discovery from the Government and (2) the District Court's determination that the facts surrounding the indictment gave rise to a presumption of vindictiveness. In reversing the District Court, the Fourth Circuit also concluded that any vindictive animus held by South Carolina federal

prosecutors was irrelevant, despite the fact that no independent investigation was conducted by the North Carolina federal prosecutors until after an indictment was obtained in North Carolina. On September 12, 2001, the Fourth Circuit denied a timely petition for reconsideration or rehearing en banc.

IX. ARGUMENT

A. The Fourth Circuit's holding that a vindictive animus held by the United States Attorney who referred the case for prosecution is irrelevant stands in direct conflict with the prior decisions of other circuits.

In the present case, the Fourth Circuit concluded that any vindictive animus held by the U.S. Attorney in South Carolina was irrelevant because the U.S. Attorney in North Carolina who obtained the indictment was not aware that the referral was motivated by a vindictive animus. Wilson, 262 F.3d at 320. This holding places the Fourth Circuit in direct conflict with prior decisions of other circuits.

In United States v. Koh, 199 F.3d 632 (2d Cir. 1999), the Second Circuit held that a prosecution will be found to be vindictive either when the prosecutor harbors animus toward the defendant or when the prosecutor has been "prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a 'stalking horse.'" Id. at 640 (quoting United States v. Aviv, 923 F. Supp.

35, 36 (S.D.N.Y. 1996)); accord United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000). Other circuits have similarly concluded that an indictment must be dismissed if the prosecutor was prevailed upon by one holding a vindictive animus and the indictment would not have been brought but for the vindictive animus. See United States v. Schoolcraft, 879 F.2d 64, 68 (3d Cir. 1989); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Monsoor, 77 F.3d 1031 (7th Cir. 1996); see also United States v. P.H.E., Inc., 965 F.2d 848, 859 (10th Cir. 1992) (Government may not "precede an indictment with a campaign of harassment and prosecutorial misconduct" and then defeat a claim of vindictive prosecution because the prosecutor who obtains the indictment remains aloof of the constitutional taint).

Citing Koh, the district court, in rendering its decision in the present action, considered the animosity held by federal prosecutors in South Carolina against Mr. Wilson. The South Carolina United States Attorney referred the present case to North Carolina for prosecution. The prosecution memorandum prepared by South Carolina federal prosecutors contained numerous false statements about the defendant that were designed to stir the North Carolina prosecutors to indict him. Moreover, that prosecution memorandum (including its numerous factual errors) was blindly accepted by the North Carolina United States Attorney without any independent evaluation of the facts. The Fourth Circuit, however, concluded that the motivations of the South Carolina United States Attorney were

irrelevant and that the district court was in error for relying upon any animus held by South Carolina prosecutors. Not only does such a ruling place the Fourth Circuit in conflict with the Second, Third, Sixth and Seventh Circuits, the Fourth Circuit's willingness to draw artificial distinctions between prosecutors of the same sovereign disregards prior precedent of this Court.

As this Court stated in S&E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972) (citing Vitarelli v. Seaton, 359 U.S. 535 (1959)), "A citizen has the right to expect fair dealing from his government, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities." United States Attorneys shoulder a duty to ensure the fairness of their actions in criminal proceedings. Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ."). In Giglio v. United States, 405 U.S. 150, 154 (1972), the Court made clear that the words and conduct of federal prosecutors are attributable to the Government: "The prosecutor's office is an entity and as such it is the spokesman for the Government."

Under the Fourth Circuit's decision, a prosecutor acting with vindictive motives may refer a case to another United States Attorney for prosecution and insulate the prosecution from constitutional challenge, provided the prosecutor who ultimately goes before the grand jury to obtain

the indictment accepts the referral without inquiry. Under the Wilson decision, a prosecutor may now do indirectly that which the constitution does not permit to be done directly. This Court has made clear, however, that whether a prosecution is tainted by vindictive animus "does not hinge on the continued involvement of a particular individual." Thigpen v. Roberts, 468 U.S. 27, 31 (1984). The Fourth Circuit's decision undercuts the fairness and integrity of criminal prosecutions. Accordingly, that decision raises an important federal question that should be addressed by this Court.

B. This Court should clarify the standard of review applicable to vindictive prosecution claims.

The courts of appeals have repeatedly applied the clearly erroneous standard of review to a district court's factual determination that a prosecutor's charging decision is tainted by vindictive animus. See, e.g., United States v. Koh, 199 F.3d 632, 639 (2d Cir. 1999); United States v. Schoolcraft, 879 F.2d 64, 67 (3d Cir. 1989); United States v. Johnson, 91 F.3d 695, 698 (5th Cir. 1996); United States v. Bullis, 77 F.3d 1553, 1559 (7th Cir. 1996); United States v. Wall, 37 F.3d 1443, 1448 (10th Cir. 1994); United States v. Meyer, 810 F.2d 1242, 1244 (D.C. Cir. 1986). A conflict exists among the circuits, however, as to what deference, if any, should be given to a district court's determination that the facts warrant a presumption of vindictiveness. This conflict should be resolved by this Court because the issue will result in continued litigation within those circuits that have not yet ruled on this issue. In fact, the Ninth Circuit,

while refusing to adopt a standard of review, has repeatedly reiterated that the appropriate standard of review is "unsettled." See, e.g., United States v. Montoya, 45 F.3d 1286, 1291 (9th Cir. 1995). The conflict impacts the perceived fairness of the criminal justice system in that the appellate scrutiny given to a criminal defendant's case currently differs based upon the geographical location where he is indicted. Moreover, the de novo standard adopted by the Fourth Circuit will tax the limited resources of appellate courts if the facts of every vindictive prosecution claim must be reviewed de novo without any deference to the trial court's factual findings that give rise to a presumption of vindictiveness.

A split exists among the circuits as to whether deference should be given to a district court judge's determination that the facts before it merit a presumption of vindictiveness. The Seventh, Tenth and D.C. Circuits have expressly held that a district court's conclusion to apply a presumption of vindictiveness is reviewed under the clearly erroneous standard. United States v. Perez, 79 F.3d 79, 81 (7th Cir. 1996); United States v. Woods, 36 F.3d 945, 946 (10th Cir. 1994); United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987).

In contrast to these circuits, the Fourth Circuit held in the present case that a district court's determination to apply a presumption of vindictiveness is reviewed de novo "because we are determining the legal adequacy of the evidence." Wilson, 262 F.3d at 316. In its decision, the Fourth Circuit offers no further explanation as to why it

applied a standard of review at odds with the other circuits that have expressly addressed this issue.

As this Court has made clear, the touchstone for applying a presumption of vindictiveness is whether the circumstances surrounding the charging decision create a "realistic likelihood of 'vindictiveness.'" Blackledge v. Perry, 417 U.S. 21, 27 (1974). The trial judge is in the best position to weigh the credibility of the witnesses before it and to determine whether the surrounding circumstances create an apprehension that the charging decision is tainted by vindictive animus. Accordingly, the Seventh, Tenth and D.C. Circuits have appropriately concluded that appellate courts should give deference to the trial court's determination. As Judge Posner held in United States v. Perez, 79 F.3d 79, 82 (7th Cir. 1996):

> [W]e think the presumption of vindictiveness is best viewed as simply shifting the burden of proof on the issue of intent to the prosecution . . . , rather than as altering the purely factual nature of the issue. If so, it is utterly plain that the applicable standard here is one of clear error . . . .

Provided the district court was guided by the correct legal principles in determining whether the facts merit a presumption of vindictiveness, the Fourth Circuit should not have substituted its view of the facts for those of the trial court. The de novo standard adopted by the Fourth Circuit will require appellate courts to expend significant judicial

resources making factual findings. Such factual determinations are best left to the trial judge.

C. The Courts of Appeals are similarly split as to the standard of review applicable to discovery orders in vindictive prosecution claims.

The circuits are split on the appropriate standard of review of discovery orders in claims of vindictive or selective prosecution. The First, Second, Sixth, Eighth, Ninth and Eleventh Circuits have held that a district court's discovery orders in such actions may only be reversed if the district court judge abused his or her discretion. United States v. Graham, 146 F.3d 6, 9 (1st Cir. 1998) (selective prosecution); United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000) (vindictive prosecution); United States v. Jones, 159 F.3d 969, 977 (6th Cir. 1998) (selective prosecution); United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1994) (clearly erroneous standard applied to selective prosecution claim); United States v. Bourgeois, 964 F.2d 935, 937 (9th Cir. 1992) (selective prosecution); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997) (selective prosecution); but see United States v. Gamez-Orduno, 235 F.3d 453, 462 n.9 (9th Cir. 2000) (standard of review applicable to discovery order in a vindictive prosecution claim is "unclear").

Only the Fourth and Tenth Circuits have applied a de novo standard of review to discovery orders in selective and vindictive prosecution claims. In United States v. Olvis, 97 F.3d 739, 743 (4th Cir. 1996), the Fourth Circuit held that discovery orders

in a selective prosecution claim should be reviewed de novo on appeal. In the present case, the Fourth Circuit applied its holding in Olvis to discovery orders in vindictive prosecution claims. Wilson, 262 F.3d at 316. The Tenth Circuit has adopted the approach taken by the Fourth Circuit. In United States v. James, 257 F.3d 1173, 1177-78 (10th Cir. 2001), the United States argued that an abuse of discretion standard should govern a district court's decision as to whether a defendant will be permitted discovery of the government. The Tenth Circuit rejected the Government's argument and applied a de novo standard. In doing so, the Tenth Circuit simply quoted from the Fourth Circuit's decision in Olvis.

The Fourth Circuit correctly recognized in Olvis that this Court's decisions make clear that a defendant is not entitled to discovery in every case in which a claim of selective or vindictive prosecution is asserted. As this Court held in United States v. Armstrong, 517 U.S. 456, 468 (1996), a "rigorous standard for discovery" must be applied to ferret out selective prosecution claims that are devoid of any merit. The district courts, however, are fully capable of applying different thresholds prior to allowing discovery to proceed. If the district court is guided by the appropriate threshold, the determination of whether discovery should proceed best lies in the hands of the district court. Little, if anything, is achieved by transferring that practical determination from the hands of the trial judge to a panel of the court of appeals. The Fourth Circuit's substitution of a de novo standard of review for the traditional

abuse of discretion standard in discovery matters undermines a standard of review that has stood in place for decades. See, e.g., Simmons v. United States, 390 U.S. 377, 388 (1968).

The significance of the Fourth Circuit's departure from the traditional abuse of discretion standard is highlighted by the facts of this case. Here, given the questionable timing of the indictment and the misrepresentations made by the Assistant United States Attorney who referred the case for prosecution, the district court noted that the circumstances of the indictment concerned the court "immensely." The district court was in an appropriate position to evaluate the credibility of the information before it and to conclude that the prosecutor should explain the charging decision. The United States chose not to produce the witnesses that the district court ordered to testify. On remand from the Fourth Circuit's ruling, the district court will now be precluded from requiring the United States to address the troubling issues posed by the handling of the prosecution.

Through its adoption of a de novo standard of review, the Fourth Circuit has substituted its view of the evidence for that of the district court and has precluded the district court from getting to the bottom of a situation that the district court judge found to be disturbing. De novo review of discovery orders undermines the ability of the trial court to conduct an appropriate inquiry when it perceives that misconduct has occurred. Moreover, de novo review encourages both criminal defendants and prosecutors to seek a fresh bite at the apple on appeal

in that deference is no longer given to the trial court's determination. Such a standard threatens to clog the appellate system with numerous claims of selective and vindictive prosecution.

X. CONCLUSION

The petition for writ of certiorari should be granted.

WILEY GENE WILSON

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December 11, 2001

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 00-4767

WILEY GENE WILSON,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4807

WILEY GENE WILSON,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CR-00-70-H, CR-00-79-H)

Argued: May 10, 2001

Decided: August 16, 2001

Before NIEMEYER and GREGORY, Circuit Judges, and Arthur L. ALARCON, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Gregory and Senior Judge Alarcon joined.

COUNSEL

ARGUED: Anne Margaret Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellant. Christopher G. Browning, Jr., HUNTON & WILLIAMS, Raleigh, North Carolina, for Appellee. ON BRIEF: Janice McKenzie Cole, United States Attorney, Raleigh, North Carolina, for Appellant. Carolyn A. Dubay, HUNTON & WILLIAMS, Raleigh, North Carolina, for Appellee.

OPINION

NIEMEYER, Circuit Judge

On the motion of Wiley Gene Wilson, the district court dismissed an indictment charging him with escape on the ground that the prosecution was motivated by vindictiveness. The court found that the U.S. Attorney for the Eastern District of North Carolina prosecuted Wilson on the request of the U.S. Attorney for the District of South Carolina solely in furtherance of personal animus against Wilson based on Wilson's successful appeal of an unrelated conviction obtained by the South Carolina U.S. Attorney. The court denied Wilson's motion to dismiss for lack of venue.

Because Wilson failed to satisfy the rigorous standard for overcoming the presumption of prosecutorial regularity, we reverse, reinstate the indictment, and remand for further proceedings. We affirm the district court's venue ruling.

I

In April 1997, Wiley Gene Wilson was arrested in Pageland, South Carolina, for possessing a firearm while being a felon, in violation of 18 U.S.C. § 922(g). At the time of his arrest, Wilson was in violation of the parole conditions of a 1983 conviction for kidnapping as a result of charges that had been filed against him in a Nevada state court for attempted theft. Based on this parole violation, Wilson was incarcerated at the federal prison in Butner, North Carolina, and began serving the remaining seven-

plus years of his sentence for the kidnapping conviction. When Wilson was convicted on the firearm-possession charge, he was given a 210 month term of imprisonment to be served at Butner consecutive to the kidnapping sentence.

Shortly after Wilson's conviction for possessing a firearm, the Federal Bureau of Prisons transferred Wilson from Butner to Nevada under the Interstate Agreement on Detainers Act for the limited purpose of permitting him to respond to the state theft charges pending against him there. Prior to his transfer, Wilson signed an agreement in which he acknowledged that he was being temporarily transferred to state custody; that he was aware that state officials were not to release him into the community; that he would not receive credit for his federal sentence for any period of time he was in the community following an erroneous release by state officials; and that he would call the Bureau of Prisons immediately should he be released or transferred to anywhere other than to federal custody.

In December 1998, a month after Wilson was transferred from Butner to Nevada, the Nevada charges were resolved with the imposition of a sentence for time served. Instead of returning Wilson to the Bureau of Prisons, Nevada authorities released him into the community because of a mix-up in paperwork resulting from Nevada's prosecution of Wilson under an alias. Instead of notifying Nevada authorities of the mix-up or calling the Federal Bureau of Prisons, as he had agreed to do, Wilson fled to El Monte, California. He was found a few weeks later at his sister's home and was returned to

Butner in January 1999 to serve the remainder of his sentences for the 1983 kidnapping conviction and for the 1998 firearm-possession conviction.

Upon Wilson's reincarceration, Deputy U.S. Marshal John Hardy of the Eastern District of North Carolina promptly opened a file in which he recommended that Wilson be prosecuted for escape. Hardy was, however, unsure in which district venue was proper for the alleged offense. After consulting an Assistant U.S. Attorney in the Eastern District of North Carolina, who advised him that venue lay in the District of Nevada, Deputy Marshal Hardy forwarded his report to the U.S. Attorney's Office in the District of Nevada. Wilson was never prosecuted in Nevada, however, because authorities in Nevada did not agree that venue was appropriate there.

During the same period and parallel to Hardy's efforts, Assistant U.S. Attorney William Day and Deputy U.S. Marshal James Batey, both of whom were from the District of South Carolina and had been involved with Wilson's firearm-possession prosecution, inquired about the status of a prosecution of Wilson for escape. Even after Batey was told that the prosecution had been transferred to the District of Nevada, he continued to direct inquiries about its status to North Carolina. Eventually Batey prepared a memorandum, dated January 25, 2000, describing the facts of escape and requesting that the matter be considered for prosecution in North Carolina. He sent the memorandum to Deputy Marshal Tex Lindsey in the Eastern District of North Carolina. The memorandum noted that Wilson had "threatened the

original sentencing judge [in the firearm-possession case] and had filed numerous actions against jailers and U.S.M.S. personnel." As Batey later explained, the threat had been reported to the marshals and the judge by one of Wilson's fellow inmates.

In March 2000, a month and a half after Batey's memorandum was first sent, and more than a year after Wilson was returned to Butner, his conviction for firearm possession was vacated on appeal because the firearm was obtained pursuant to an unconstitutional automobile stop. See United States v. Wilson, 205 F.3d 720, 724 (4th Cir. 2000) (en banc) . The day after the opinion was released, efforts to have Wilson prosecuted for escape were stepped up when Deputy Marshal Batey's January 25 memorandum was faxed to the U.S. Attorney in South Carolina. On March 14, 2000, a few days after receiving the memorandum, the U.S. Attorney for the District of South Carolina sent an e-mail message to the U.S. Attorney for the Eastern District of North Carolina, requesting that Wilson be prosecuted for escape.[1]

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[1] The e-mail reads:

I am writing to request that your district consider the prosecution of Wiley Gene Wilson for his escape from FCI Butner, NC custody in December of 1998. Actually, Mr. Wilson escaped while he was in Nevada on a writ for disposition of state charges there -- he was in federal custody pursuant to this district's (South Carolina) prosecution of him for firearm offenses. I understand it is your district that can prosecute this escape since he was to return to Butner upon disposition of the Nevada matters.

(continued . . .)

This memorandum contained a handwritten notation that an indictment would have to be obtained soon because Wilson's release from Butner might be "imminent."[2] Based on this request and after a prosecutorial memorandum was prepared, the U.S. Attorney for the Eastern District of North Carolina obtained an indictment against Wilson on April 18, 2000, charging him with escape. After the factual basis for the charge was further investigated, a superseding indictment making corrections was obtained and filed on May 17, 2000.

Wilson filed a motion to dismiss the indictment charging him with escape on the ground that it was

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Deputy U.S. Marshal Jim Batey of the Florence office has previously corresponded regarding this matter with Deputy U.S. Marshal Tex Lindsey of your district (back in January of this year). The Marshal's office was particularly interested in having Mr. Wilson prosecuted because of his threats against the sentencing Judge and other aggravating factors.

The matter recently came to my attention because Mr. Wilson's conviction by this district was vacated by the Fourth Circuit (2000 WL 253604 March 7th en banc) . This district seeks Mr. Wilson's escape prosecution, not because of the Fourth Circuit's decision, but because we consider Mr. Wilson dangerous –thus, the DUSM made his request long before the recent appellate court decision.

If you are interested, you could have someone contact AUSA Bill Day (843/667-3982) of this district or DUSM Jim Batey (843/662-0750) for more details; or feel free to call me.

[2] In fact, it appears that Wilson becomes eligible for parole on his kidnapping sentence in November 2001.

brought vindictively and selectively to punish him for successfully invoking his appeal rights in the firearm-possession case. He also contended that venue did not lie in the Eastern District of North Carolina.

In his motion to dismiss, based on "vindictive and selective prosecution," a motion which commenced a procedural thicket, Wilson requested that the indictment be dismissed or, alternatively, that he be afforded discovery on his claim. The motion relied on (1) Wilson's successful appeal of his firearm-possession conviction; (2) the timing of the escape prosecution, which commenced immediately after Wilson's success in the firearm-possession case; and (3) the alleged "manufacture" of an escape charge, based on the negligence of Nevada authorities, more than a year after Wilson was reincarcerated. On these facts, Wilson requested that the district court "presume vindictiveness" by the prosecutor in the Eastern District of North Carolina or, alternatively, order discovery. In its response, the government provided factual support for the charging decision, which included both the Batey memorandum of January 25, 2000, authored before the Fourth Circuit's ruling in the firearm-possession case, and the South Carolina U.S. Attorney's e-mail memorandum of March 14, 2000, to the U.S. Attorney in the Eastern District of North Carolina, authored after the Fourth Circuit's ruling in the firearm-possession case.

The district court rejected Wilson's venue challenge, but, because Deputy Marshal Batey's January 25 memorandum had been faxed to the U.S.

Attorney for South Carolina immediately on the heels of Wilson's successful appeal and because the memorandum exaggerated Wilson's alleged threat against the sentencing judge, the court concluded that Wilson had shown enough to justify requiring the government to respond to discovery on Wilson's vindictiveness claim. The court stated, "the evidence presented does not raise a procedural presumption that the prosecutors acted selectively or vindictively. However, the court [does] find that the existing evidence [is] sufficient to warrant a full and adequate discovery period." The government objected to the court's ruling and sought a protective order based on 5 U.S.C. § 301 and 28 C.F.R. § 16.21 et seq., which regulate the disclosure of such prosecutorial information. Pending a ruling on its motion, the government refused to comply with subpoenas or turn over requested documents. Without resolving this discovery dispute, the district court held an evidentiary hearing on the vindictiveness claim on August 14, 2000.

After Wilson argued the significance of the two memoranda that the government had attached to its initial response to the motion to dismiss, as well as the timing of the indictment charging escape, the district court found that Wilson had made a "prima facie showing of an unusual prosecution." The court explained:

> She [counsel for Wilson] has correctly stated that she doesn't have a lot of evidence but the documents that she has been given, the memorandum from [South Carolina U.S. Attorney] J. Rene

> Josey and the memorandum from [Deputy Marshal] James [Batey], if you consider the dates and you consider that this was an escape that allegedly occurred a year plus and then all of a sudden three or four or five or six days after the 4th Circuit's decision comes down, appears to me, Mr. Renfer, there was quite a bit of activity and I would conclude that that's enough to at least make an initial showing.

After the government presented testimony, the court concluded that Wilson had proved, by clear and convincing evidence, that "the prosecution of Wiley Wilson was vindictive." The court stated:

> I base my decision heavily on government's Exhibit No. 2, the memorand[um] [of March 14, 2000] between United States Attorney Josey and United States Attorney Cole of the Eastern District of North Carolina.
>
> I further base my decision on the testimony of Deputy United States Marshal [Batey], who testified that he pursued Wilson's prosecution solely because of [South Carolina] Assistant United States Attorney Day's request. I find that Day's activity was concurrent in time with the appeal before the 4th Circuit for the underlying prosecution.

> It is clear that Deputy United States Marshal [Batey] found the defendant "very aggravating" and wanted him prosecuted. The court discounts the memo's reference to the defendant's threats on a U.S. Judge in that the government's witness, Deputy U.S. Marshal [Batey], testified that the judge and the Federal Public Defender, who was also mentioned, were not concerned about these threats.
>
> The court also considers the indictment of the defendant coming one plus years after the escape and some few days after the vacation by the 4th Circuit of the underlying conviction to weigh toward the overall evidence supporting vindictiveness.
>
> I find there was a vindictive animus by Department of Justice persons.

Accordingly, the court dismissed the indictment.

The government filed a motion for reconsideration, arguing (1) that the district court never ruled on the discovery dispute over the government's request for a protective order and (2) that the court never imposed the burden on Wilson of establishing facts to justify a presumption of vindictiveness before authorizing discovery and shifting the burden of production to the government. The government then waived the regulation of its prosecutorial decisionmaking and provided the court

with further details of the decision to indict Wilson for escape. The prosecutors in the Eastern District of North Carolina stated that they reviewed the file independently to ascertain whether they could prove the elements of an escape, noting the office's well-established policy to "prosecute all escapes from our district if we can prove the elements of the crime." They also noted their preparation of a "prosecution memorandum" on March 30, 2000, outlining the facts, evidence, legal and evidentiary issues, witnesses, and penalties. In addition, the government provided affidavits showing that Wilson had a long criminal record, perpetrated through at least 17 aliases, and that the prosecutors in the District of South Carolina had concluded that Wilson was a "career criminal who is a danger to the community." South Carolina Assistant U.S. Attorney Day stated that he had long believed that Wilson should be prosecuted for the escape and had begun his efforts to this end over a year before the Fourth Circuit vacated the firearm-possession conviction. And when the Fourth Circuit vacated the firearm-possession conviction, he, together with Deputy Marshal Batey, visited the U.S. Attorney for South Carolina to recommend the commencement of an escape prosecution in North Carolina because of their belief that Wilson's release would pose a threat to the community.

The district court considered the new evidence introduced by the government but denied its motion for reconsideration. The court noted that "the government does not provide the independent reasons necessary to thwart the presumption of

vindictiveness raised by the defendant." Moreover, on the question of whether Wilson actually proved vindictiveness, the court found:

> First, it is clear from the record that it had been well over a year between the time defendant was erroneously released and the time that a decision was made to prosecute this case. During that year no one had shown any interest in prosecuting this case.
>
> * * *
>
> Second, based on evidence presented at the evidentiary hearing, the court does not find the alleged threat to Judge Currie to have been serious or even tenable. Having examined the vast record in this matter, the court cannot find credible evidence that suggests that the defendant poses a serious danger to the community.
>
> Finally, the defendant has provided substantial evidence that the U.S. Attorney in South Carolina prevailed upon the U.S. Attorney in this district to bring the current charges against him. When the memorandum from Deputy Marshal James Batey, which was faxed to the U.S. Attorney's office in South Carolina on March 8, 2000, the day after defendant won his appeal, was not sufficient to spur the U.S.

> Attorney for the Eastern District of North Carolina to prosecute, the sitting U.S. Attorney in South Carolina personally requested the sitting U.S. Attorney in this district to prosecute.

The court also found that "'but for' defendant's successful appeal and the personal request of the U.S. Attorney in South Carolina, the government would not have prosecuted this matter."

The government filed this appeal challenging the district court's conclusion, as a matter of law, that Wilson provided enough evidence to require discovery on his vindictive prosecution claim or to establish a presumption of vindictiveness, as well as the court's factual finding of an actual vindictive motivation in seeking the indictment charging Wilson with escape. Wilson cross-appealed, challenging venue in the Eastern District of North Carolina.

II

Wilson's motion to dismiss based on prosecutorial vindictiveness asserted that his prosecution in North Carolina for escape, undertaken only after his successful appeal in the firearm-possession case in South Carolina, was pursued to punish him for his success in having the firearm-possession conviction vacated. He contended below that the U.S. Attorney in North Carolina acted on the request of the U.S. Attorney in South Carolina who had a personal interest in punishing Wilson for his successful appeal and that the North Carolina

prosecution was therefore motivated by actual vindictiveness. Wilson maintained that his prosecution for escape was not a "legitimate response" to the escape which occurred over a year earlier. The district court agreed and dismissed the indictment.

The government contends on appeal that the district court clearly erred in finding as fact that the prosecutors in the Eastern District of North Carolina held a vindictive animus against Wilson in prosecuting him or that they failed to act independently of the U.S. Attorney for the District of South Carolina in making the charging decision. It also contends that the district court erred as a matter of law by applying a presumption of vindictiveness because the prosecution of Wilson for escape was independent of the firearm-possession conviction obtained by the District of South Carolina and later vacated.

In addressing the complicated jurisprudence of a prosecutorial vindictiveness claim, we must thus determine both (1) whether the finding that Wilson's prosecution for escape was actually motivated by prosecutorial vindictiveness is supported by the evidence and (2) whether, as a legal matter, the district court correctly relied on a presumption of vindictiveness in the circumstances presented to it.

A

It is now well established that a prosecutor violates the Due Process Clause of the Fifth Amendment by exacting a price for a defendant's

exercise of a clearly established right or by punishing the defendant for doing what the law plainly entitles him to do. See United States v. Goodwin, 457 U.S. 368, 372 (1982); North Carolina v. Pearce, 395 U.S. 711, 724 (1969). Thus, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. See Blackledge v. Perry, 417 U.S. 21, 28-29 (1974). Such retaliatory conduct amounts to vindictive prosecution and is unconstitutional.

Indeed, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the [United States] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citations omitted).

To establish prosecutorial vindictiveness, a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus. See Goodwin, 457 U.S. at 380 n.12 (noting that the charges must be brought "solely to 'penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion"); United States v. Sanders , 211 F.3d 711, 717 (2d Cir. 2000).

If the defendant is unable to prove an improper motive with direct evidence, he may still present evidence of circumstances from which an improper

vindictive motive may be presumed. To invoke such a presumption, a defendant must show that the circumstances "pose a realistic likelihood of 'vindictiveness.'" Blackledge, 417 U.S. at 27. By recognizing the possibility of creating a presumption that shifts the burden to the government to justify its conduct, not only is vindictive prosecution deterred, but also defendants are "freed of [the] apprehension of such a retaliatory motivation." Goodwin, 457 U.S. at 376. But such a presumption is warranted only when circumstances warrant it for all cases of the type presented. See id. at 381. Because the presumption of vindictiveness must be applicable to all cases presenting the same circumstances, it will rarely, if ever, be applied to prosecutors' pretrial decisions. See id. Because of the broad discretion given prosecutors and the wide range of factors that may properly be considered in making pretrial prosecutorial decisions, "a prosecutor should remain free before trial to exercise [that] broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." Id. at 382. "Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than a pretrial decision." Id. at 381 (emphasis added). When a presumption of vindictiveness is warranted, the burden shifts to the government to present objective evidence justifying its conduct. See id. at 374, 376 n.8.

Although prosecutorial decisions must not be made in retaliation against defendants for exercising their legal rights, courts must nonetheless be

cautious not to intrude unduly in the broad discretion given to prosecutors in making charging decisions. Indeed, a prosecutor's charging decision is presumptively lawful. See United States v. Armstrong, 517 U.S. 456, 464 (1996). As the Armstrong Court noted:

> A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal law . . . As a result, [t]he presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Id. (internal quotation marks and citations omitted). The same may be said of vindictive prosecution claims.

Because of this necessary presumption of prosecutorial regularity, a presumption of vindictive prosecution, or any other type of selective prosecution, must be supported by a showing

sufficiently strong to overcome the presumption of prosecutorial regularity. Indeed, even before a court allows a defendant to have discovery on the government's prosecutorial decisions, the defendant must overcome a significant barrier by advancing objective evidence tending to show the existence of prosecutorial misconduct. The standard is a "rigorous" one. Id. at 468. As we summarized the standard more fully in United States v. Olvis:

> Just as the standard for ultimately proving a selective prosecution claim is a rigorous one, so too is the evidentiary threshold for obtaining discovery from the government to support such a claim. A significant barrier to discovery is necessary because discovery "imposes many of the costs present when the government must respond to a prima facie case of selective prosecution"; it diverts governmental resources and discloses prosecutorial strategies.

97 F.3d 739, 743 (4th Cir. 1996) (quoting Armstrong, 517 U.S. at 464); see also Sanders, 211 F.3d at 717 (holding that the standard for ordering discovery on a vindictive prosecution claim is the same as that for ordering discovery on a selective prosecution claim).

We review the district court's orders for discovery and establishing a presumption of vindictive prosecution de novo because we are determining the legal adequacy of the evidence to support such orders. See Olvis, 97 F.3d at 743.

B

We address first whether Wilson satisfied his burden of proving that the decision by the U.S. Attorney in the Eastern District of North Carolina to prosecute Wilson for escape was motivated by actual vindictiveness -- in this case by reason of the personal interest of the U.S. Attorney in South Carolina to punish Wilson for appealing his firearm-possession conviction and having it vacated. To establish actual vindictiveness, Wilson must prove not only that the prosecutor charging him with escape harbored vindictive animus but also that he pursued the escape prosecution solely to punish Wilson for his success in the South Carolina case. See Goodwin, 457 U.S. at 380 n.12. Indeed, Wilson must carry the heavy burden of proving that the escape prosecution "could not be justified as a proper exercise of prosecutorial discretion." Id.

We come to this question by first recognizing the undisputed facts that buttress the presumption of "regularity" in the escape prosecution. See Armstrong, 517 U.S. at 464. First, in this case the government had evidence that Wilson failed to report to the Federal Bureau of Prisons upon his release by Nevada authorities and that he did so knowingly because he signed an agreement that clearly described his responsibilities. Second, a grand jury found that the evidence supported a finding of probable cause that Wilson violated 18 U.S.C. § 751 (punishing escape). Third, the facts giving rise to the escape prosecution were unrelated to the facts giving rise to the firearm-possession case and therefore merited at least one initial review for prosecution.

Fourth, the prosecutor in the firearm-possession case was different from the prosecutor who had jurisdiction over the escape prosecution. Fifth, efforts to initiate the escape prosecution began immediately after the escape and long before the firearm-possession conviction was vacated, and no decision was ever made not to prosecute the escape charge. And finally, the U.S. Attorney for the Eastern District of North Carolina had a policy of prosecuting all escapes.

Wilson's theory of demonstrating actual vindictive animus relies on an ability to prove that the South Carolina U.S. Attorney held a vindictive animus based on Wilson's successful appeal of his firearm-possession conviction and that this animus was somehow transferred to the U.S. Attorney for the Eastern District of North Carolina through the March 14 e-mail. But Wilson has presented no evidence to support this theory. The only communication in the record between the South Carolina U.S. Attorney and the North Carolina U.S. Attorney is the March 14 e-mail in which Wilson's prosecution for escape is "requested." In support of the request, the South Carolina U.S. Attorney summarized the facts of escape and expressed the opinion that Wilson's release from prison would pose a danger to the community. There is nothing in the e-mail, or elsewhere in the record, to suggest that the U.S. Attorney in North Carolina was required to act on the request or felt any compunction to act for any reason other than the duty to prosecute cases in the public interest. As it turned out, a deputy marshal in the Eastern District of North Carolina had already

opened a file shortly after the escape, revealing that district's preexisting interest in the prosecution. Moreover, the U.S. Attorney for the Eastern District of North Carolina had a policy of prosecuting all escapes. The delay in prosecuting Wilson's escape was attributed to confusion with the District of Nevada over venue. Finally, when the U.S. Attorney in North Carolina received the e-mail request from the South Carolina U.S. Attorney, the matter was assigned to an Assistant U.S. Attorney in North Carolina who prepared a prosecution memorandum noting reasons that justified the prosecution. There is no evidence that the North Carolina U.S. Attorney or her assistants acted with any purpose of punishing Wilson's victory in the firearm-possession case or of vindicating any personal interest of the U.S. Attorney in South Carolina to punish Wilson for exercising his right to appeal the South Carolina conviction.

Wilson's theory on proving causation -- that his prosecution for escape was undertaken solely because of vindictiveness -- is even more lacking of evidentiary support. He argues that because (1) the escape prosecution followed on the heels of his success in the firearm-possession case and (2) the prosecution for escape had not progressed to an indictment for over a year after the escape, it must follow that the escape prosecution was motivated solely because of Wilson's success in the firearm-possession case. Again, this argument is belied by the record. After the case had been transferred to Nevada by the deputy marshals in North Carolina, the person who persisted in returning the prosecution to North Carolina was Deputy Marshal

Batey from the District of South Carolina. But the beginning of his efforts to prosecute Wilson in North Carolina preceded Wilson's success in the appeal of his firearm-possession case. While the evidence supports the conclusion that the escape prosecution was accelerated following the Fourth Circuit's decision in the firearm-possession case, that haste was attributable to the prosecutors' interest in not having Wilson returned to the street in view of his perceived dangerousness. But such a motivation is in furtherance of the public interest, not in vindication of the personal interests of the prosecutor to punish Wilson for succeeding on his appeal.

In the face of strong probable cause that Wilson committed the crime of escape, judicial intervention should not deny the community the benefit of a prosecution unless Wilson can show that he would not have been prosecuted for escape but for the vindictive motive of prosecutors to punish him for successfully exercising his right of appeal in the firearm-possession case. Wilson has not carried this heavy burden. We therefore conclude that the district court clearly erred in finding otherwise.

C

Even though Wilson is unable to demonstrate actual vindictiveness, he still could succeed on his claim of vindictive prosecution by demonstrating that the circumstances of the case support a presumption of vindictiveness and thereby shift to the government the burden of justifying its conduct. To invoke this presumption, Wilson must point to circumstances surrounding the initiation of the

prosecution and show that they "pose a realistic likelihood of 'vindictiveness.'" Blackledge, 417 U.S. at 27. When the circumstances pose such a likelihood, a presumption may be warranted even if the defendant has no direct evidence of an actual retaliatory motive. See United States v. Williams, 47 F.3d 658, 660 (4th Cir. 1995). But the circumstances in this case must be sufficiently suggestive of vindictive prosecution that when similar circumstances are presented in other factual contexts, the same conclusion would be suggested. See Goodwin, 457 U.S. at 381. Moreover, the circumstances must be evaluated against the background presumption that charging decisions of prosecutors are made in the exercise of broad discretion and are presumed to be regular and proper. See Armstrong, 517 U.S. at 464.

In this case, the district court concluded that the presumption was warranted, relying principally on (1) the proximity in time of the escape prosecution to Wilson's success in the firearm-possession appeal, (2) the apparent lack of interest in prosecuting Wilson for escape for over a year, and (3) the communication between the U.S. Attorneys in South Carolina and North Carolina. After finding that "the government does not provide the independent reasons necessary to thwart the presumption of vindictiveness raised by the defendant," the court concluded that the escape prosecution was motivated by vindictiveness.

The government challenges the district court's conclusion that a presumption applied in the circumstances of this case, contending that "[t]he district court committed legal error by applying a presumption of vindictiveness to the United States"

when "the escape prosecution was initiated by the [Eastern District of North Carolina], which had no stake in the firearm conviction obtained in the [District of South Carolina]" and when "the escape offense prosecuted in the [Eastern District of North Carolina] was entirely independent of the firearm offense prosecuted in the [District of South Carolina]." Wilson, on the other hand, contends that the district court correctly applied a presumption of vindictiveness, because the "prosecution . . ., initiated days after his successful appeal and over a year after his erroneous release, is not a 'legitimate response' to the errors of law enforcement personnel in Nevada who mistakenly released Wilson."

At bottom, the circumstances on which Wilson relies to invoke the presumption of vindictiveness relate to the timing of the indictment for escape, filed within days of his successful appeal of an unrelated firearm-possession conviction, and the knowledge of the escape held by prosecutors for over a year prior to the successful appeal. But also relevant is the fact that Wilson's successful appeal resulted in his conviction being vacated, rather than merely remanded for a new trial, such that he was certain to be released from prison much sooner than if his conviction had been affirmed or sent back for retrial.

The Supreme Court has noted that each of the decisions in which it has recognized a presumption of vindictiveness reflects the Court's awareness "of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided." Goodwin, 457 U.S. at 376. In declining to impose a presumption of vindictiveness to a

prosecutor's pretrial decision to add charges to an indictment after a defendant failed to plead guilty to the original charges as anticipated, the Court noted the absence of "the institutional bias against the retrial of a decided question," which undergirds each of the decisions in which it has deemed a presumption of vindictiveness to be appropriate. Id. at 383. The Court concluded that this bias against the redetermination of a previously decided factual question "simply has no counterpart in [a] case" where the prosecutor has made a decision adverse to the defendant in the process of preparing for trial. Id. Also relevant to the Court's determination that a presumption was unwarranted was the fact that the "prosecutor ha[d] no 'personal stake' . . . and thus no reason to engage in 'self-vindication.'" Id.

Because both of these prerequisites to the creation of a presumption of vindictiveness -- that the escape charge had once been prosecuted and that the prosecutor of the escape charge had a personal stake in self-vindication -- are similarly absent from the charging decision made in this case, we conclude that the circumstances do not warrant a generally applicable presumption of vindictiveness based on the decision to charge Wilson with escape following his successful appeal of his firearm-possession conviction. Unlike the typical presumption case, where a defendant's successful appeal necessitates a retrial on the same charge, Wilson's successful suppression of the weapon on his appeal means he cannot be retried on that charge. Thus, any "institutional bias against the retrial of a decided question" is by definition absent from this

prosecution, which involves only an entirely new charge with a new set of facts to be adjudged. Although our determination of whether a presumption is warranted involves only the legal question of whether the situation involved "pose[s] a realistic likelihood of 'vindictiveness,'" Blackledge, 417 U.S. at 27, we think that in the situation where the charging decision was made at a time when a defendant's success on appeal would mean that he would be released from prison within a shorter time, it is at least as likely that the decision was based on the fear that the defendant would pose a threat to public safety. Because that possibility is at least as likely, or even more likely, Wilson is not able to carry his burden of showing that the prosecutor's desire to punish him for having successfully exercised his appellate rights was the likely reason for the timing.

Moreover, "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision" because "the prosecutor's assessment of the proper extent of prosecution may not have crystallized" until after a pretrial investigation of a case is fully completed. Goodwin, 457 U.S. at 381. Because the facts giving rise to the escape charge occurred after the conviction on the firearm-possession charge, this case bears a strong similarity to Goodwin, where the decision to add additional charges to an indictment was made before trial but after the defendant failed to plead as expected. Moreover, like Goodwin, the facts surrounding the charging decision are different from those in the typical case in which a presumption of vindictiveness

arises. Typically, in that type of case, at the time the prosecutor initially tried the defendant the decision was made not to try the defendant on an additional available charge later brought only after the defendant's successful appeal. In that situation, unlike in Goodwin or here, an inference may be drawn that the prosecutor's decisionmaking was influenced by the only material fact different the second time around -- the defendant's successful appeal of his original conviction. Here, there is no "record" to suggest that the prosecutor of the firearm-possession charge deemed the escape charge unworthy of prosecution at the time he prosecuted the firearm-possession charge because the facts of the escape had not yet occurred. As was the Goodwin Court, we are loathe to invade the zone of prosecutorial discretion without a demonstration of circumstances that clearly justify the presumption of a vindictive motive.

Finally, but not the least important is the fact that the prosecutor charged with vindictiveness in this case was different -- indeed, she is in a different office -- from the prosecutor who brought the charge that Wilson successfully appealed. Even if a presumption of vindictiveness could have attached on these facts to a charging decision made by the U.S. Attorney for the District of South Carolina, we could not, on this record, impute the improper motivation to the U.S. Attorney for the Eastern District of North Carolina. Cf. United States v. Hastings, 126 F.3d 310, 314 (4th Cir. 1997) (declining to impute the animus of a referring investigative agency to the government official who made the decision to prosecute). We

especially reject any contention that such an imputation would be warranted when the circumstances fail to suggest that the North Carolina U.S. Attorney was aware that the referring office might have been motivated by a vindictive animus when it requested that Wilson be indicted for escape. To the contrary, the e-mail sent from the South Carolina U.S. Attorney indicated a concern that the defendant might soon be on the street and would thus pose a danger to the community. We see no reason to assume that this legitimate prosecutorial motive was not taken at face value. Even if we were to assume that any motive could have been "transferred" by an e-mail request, we could only assume that the motive "transferred" was the one expressed, rather than an improper motive, not evidenced by the e-mail. Moreover, the fact that there was no connection between the South Carolina case successfully appealed by Wilson and the North Carolina escape prosecution can only lead to the conclusion that the attorneys in the North Carolina office had "no 'personal stake' [in Wilson's successful appeal] . . . and thus no reason to engage in 'self-vindication.'" Goodwin, 457 U.S. at 383.

In sum, we conclude, as a matter of law, that the circumstances presented in this case do not give rise to a presumption that the escape charge was prosecuted in North Carolina solely to punish Wilson for successfully appealing an unrelated conviction obtained by prosecutors from South Carolina. Because of our ruling on the merits, we do not reach the government's challenge to the district court's ruling ordering discovery.

III

On his cross-appeal, Wilson challenges venue in the Eastern District of North Carolina. He argues that he escaped in Nevada while in custody of Nevada authorities and therefore the locus delicti was Nevada. He concludes therefore that under the constitutional mandate of Article III, Section 2, he could be tried only in Nevada.

The government has the burden of establishing, by a preponderance of the evidence, that venue is proper. See United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981). And we review the district court's determination of venue de novo.

Venue lies in the State and in the district where the offense was "committed." U.S. Const. art. III, § 2, cl. 3; Fed. R. Crim. P. 18. A determination of where an offense is "committed" must be made by reference to the criminal act proscribed by the statute. See Johnston v. United States, 351 U.S. 215, 220 (1956). If the statute does not explicitly provide guidance, the location of the offense for venue purposes "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). The focus, however, is on the place, not on the person, and the defendant need not have been present in the district where the crime was committed. See Travis v. United States, 364 U.S. 631, 634 (1961).

In this case, Wilson was charged with escape under 18 U.S.C. § 751(a), which provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both . . . .

Because this statute does not explicitly fix the district in which an offense occurs, we consider the nature of the crime and the location of the act (or failure to act) constituting it. Wilson argues that the act constituting the crime was his failure, upon release from Nevada authorities, to place a telephone call to the Federal Bureau of Prisons, an omission which occurred in the District of Nevada.

This argument, however, fails to account for the total circumstances of Wilson's escape. At the time Wilson was "released" by Nevada authorities, he was a prisoner in the constructive custody of the Federal Bureau of Prisons at Butner, North Carolina. Wilson was only in Nevada under the terms of the Interstate Agreement on Detainers Act, and by those terms, he remained in the legal custody of Butner

when he was sent to Nevada on detainer, except with respect to the charge for which temporary custody was assumed by Nevada. See 18 U.S.C. app. 2 § 2, art. V(g) (explaining that a transferred prisoner is "deemed to remain in the custody of and subject to the jurisdiction of the sending State"). Thus, although Wilson was physically in the State of Nevada at the time of his escape, he was legally incarcerated in North Carolina, and after release by Nevada authorities when Wilson failed to notify federal officials of his release, as he was obligated to do, he escaped from the constructive custody of federal authorities in the Eastern District of North Carolina. See id.; cf. United States v. Overaker, 766 F.2d 1326, 1327 (9th Cir. 1985) (holding that venue was proper in an escape prosecution in the State where a defendant had failed to report because the defendant "was in the constructive custody of the [State's] authorities as soon as he was ordered to report to them").

Accordingly, Wilson's "escape[ ]... from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General," 18 U.S.C. § 751(a), as alleged in the indictment, was from an institution located in the Eastern District of North Carolina. We therefore affirm the district court's conclusion that venue properly lies in that district.

IV

In sum, we affirm the district court's ruling that venue for Wilson's prosecution for escape properly

lies in the Eastern District of North Carolina. We reverse the court's ruling dismissing the indictment on the finding that the prosecution was motivated by prosecutorial vindictiveness and the conclusion that the circumstances gave rise to a presumption of vindictiveness. We reinstate the indictment and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	5:00-CR-70-1-H
	)	
WILEY GENE WILSON,	)	
	)	
DEFENDANT.	)	
	)	

EVIDENTIARY HEARING
AUGUST 14, 2000
BEFORE
THE HONORABLE MALCOLM J. HOWARD
U. S. DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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COURT REPORTER: DONNA J. TOMAWSKI
STENOTYPE WITH COMPUTER AIDED
TRANSCRIPTION

THINK IT'S FAIR TO CONSIDER THAT SHE'S MAKING A BIG DEAL AS TO THE POLICY HOW THE DISTRICT GOES AFTER ESCAPES. THIS CAME A YEAR AGO. THEY DIDN'T WANT IT, THEY THOUGHT NEVADA HAD IT.

MR. BEATTY TESTIFIED NEVADA SENT IT BACK HERE. NO QUICK RESPONSE THEY WERE GOING TO PROSECUTE THIS. I DON'T THINK HER ARGUMENT -- IT DISAGREES WITH WHAT THE GOVERNMENT DID. IT SHOWS THESE STATEMENTS ARE FALSE ABOUT MR. WILSON. JUST BECAUSE THEY DIDN'T KNOW THEY WERE FALSE, I DON'T THINK THERE'S TESTIMONY THEY MADE SERIOUS EFFORTS TO GO AFTER THIS DEFENDANT UNTIL HE WON HIS APPEAL.

THE COURT: THANK YOU, MA'AM.

ALL RIGHT, THIS CASE CONCERNS THE COURT IMMENSELY, BUT I HAVE HEARD THE EVIDENCE THAT HAS BEEN PRESENTED. I ACKNOWLEDGE THAT THE DEFENDANT HAS BEEN THWARTED IN DISCOVERY BUT ALSO ACKNOWLEDGE THAT THE UNITED STATES HAS THOSE RIGHTS.

TO ANY EXTENT, WITH THE EVIDENCE BEFORE THE COURT, I FIND THAT BY CLEAR AND CONVINCING EVIDENCE THAT THE PROSECUTION OF WILEY WILSON WAS VINDICTIVE, AND I BASE MY DECISION HEAVILY ON GOVERNMENT'S EXHIBIT NO. 2, THE MEMORANDA BETWEEN UNITED STATES ATTORNEY JOSEY AND UNITED STATES

ATTORNEY COLE OF THE EASTERN DISTRICT OF NORTH CAROLINA.

I FURTHER BASE MY DECISION ON THE TESTIMONY OF DEPUTY UNITED STATES MARSHAL BEATTY, WHO TESTIFIED THAT HE PURSUED WILSON'S PROSECUTION SOLELY BECAUSE OF ASSISTANT UNITED STATES ATTORNEY DAY'S REQUEST. I FIND THAT DAY'S ACTIVITY WAS CONCURRENT IN TIME WITH THE APPEAL BEFORE THE 4TH CIRCUIT FOR THE UNDERLYING PROSECUTION.

IT IS CLEAR THAT DEPUTY UNITED STATES MARSHAL BEATTY FOUND THE DEFENDANT "VERY AGGRAVATING" AND WANTED HIM PROSECUTED. THE COURT DISCOUNTS THE MEMO'S REFERENCE TO THE DEFENDANT'S THREATS ON A U. S. JUDGE IN THAT THE GOVERNMENT'S WITNESS, DEPUTY U. S. MARSHAL BEATTY, TESTIFIED THAT THE JUDGE AND THE FEDERAL PUBLIC DEFENDER, WHO WAS ALSO MENTIONED, WERE NOT CONCERNED ABOUT THESE THREATS.

THE COURT ALSO CONSIDERS THE INDICTMENT OF THE DEFENDANT COMING ONE PLUS YEARS AFTER THE ESCAPE AND SOME FEW DAYS AFTER THE VACATION BY THE 4TH CIRCUIT OF THE UNDERLYING CONVICTION TO WEIGH TOWARD THE OVERALL EVIDENCE SUPPORTING VINDICTIVENESS.

I FIND THERE WAS A VINDICTIVE ANIMOUS BY DEPARTMENT OF JUSTICE PERSONS. I HEREBY GRANT THE DEFENDANT'S MOTION AND ORDER THE SUPERSEDING INDICTMENT RETURNED IN THIS DISTRICT TO BE DISMISSED. THAT'S THE RULING OF THE COURT.

I WILL NOT PRESENTLY ADDRESS THE RELEASE STATUS OF THE DEFENDANT. I DON'T KNOW WHAT THOSE CIRCUMSTANCES ARE.

IF THERE'S NEED FOR FURTHER INTERVENTION BY THE COURT, THAT CAN COME UP WITH ADDITIONAL MOTIONS.

MS. DUBAY: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: THAT CONCLUDES THIS HEARING. THAT CONCLUDES THIS HEARING. MARSHAL, COURT WILL BE ADJOURNED.

END OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5: 00-CR-70-1-H (3)

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	ORDER
WILEY GENE WILSON,	)	
	)	
Defendant.	)	
	)	

This matter is before the court on the government's Motion For Reconsideration and to Reopen Hearing. Defendant, Wiley Gene Wilson, has timely replied to this motion and the government has responded. Therefore, this matter is ripe for adjudication.

STATEMENT OF THE FACTS

This matter has its genesis in the 1997-1998 prosecution of defendant in the District of South Carolina for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (1) that led to his conviction on one of the three counts he was charged with.

On February 13, 1998, Wilson was convicted of one count of possessing a firearm. At sentencing, defendant asked for downward departure based on

the fact that he had never engaged in any violent activity and was not a danger to the community.[1] Although the court denied the downward departure motion, Judge Currie applied the minimum sentence under the guidelines. Defendant was later accused of a violently threatening Judge Currie.

Immediately following his sentencing, on September 17, 1998, defendant appealed his conviction. Defendant was sent to FCI Butner to serve his sentence. Just after getting to Butner, however, on November 17, 1998, defendant was brought to Las Vegas, Nevada, to face state charges. At the conclusion of those proceedings, officials at the Clark County Detention Center erroneously released defendant on December 15, 1998. He was located on or about January 6, 1999, and returned to federal custody, and eventually returned to Butner.

In the meantime, defendant's appeal proceeded. In his March 9, 1999, appeal brief, defendant raised six claims of error, including the fact that the vehicle in which his weapon was found was unconstitutionally stopped. On March 7, 2000, the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") granted defendant's appeal vacating the firearms conviction.

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[1] While defendant had previously been convicted of kidnapping, the conviction stemmed from a custodial kidnapping in which he claimed that the child's mother was abusing the child. Def. Ex. H at 58-60.

Immediately following defendant's success on appeal, the government, stagnant for well over a year in this matter, began to take action on a case that had been referred in early 1999. On March 8, 2000, a memorandum written by Deputy Marshal James Batey and dated January 25, 2000, accusing defendant of being violent and threatening the federal judge at his original sentencing was faxed to the Office of the U.S. Attorney for the Eastern District of North Carolina. When this memorandum did not convince the U.S. Attorney in this district to prosecute, the sitting U.S. Attorney in South Carolina personally requested the sitting U.S. Attorney in this district to prosecute the defendant in a memorandum dated March 14, 2000. On March 30, 2000, defendant was served with a detainer charging him with escape. On April 18, 2000, defendant was indicted for escape in the Eastern District of North Carolina and on May 17, 2000, a superceding indictment for escape was filed.

STATEMENT OF THE CASE

On July 25, 2000, the court issued an order allowing defendant discovery on his defense of actual vindictiveness based on the court's findings at a July 24, 2000, hearing that the defendant satisfied his burden to obtain such discovery. Through refusals explained in various motions, the government continually refused to provide the requested discovery.

The court held an evidentiary hearing on August 14, 2000, to address this issue of the government's continuous refusal to produce

discovery and to entertain defendant's motion to dismiss based on vindictive prosecution. At this hearing, the court consulted with the parties as to the most practical procedure for resolving the government's outstanding motions while also addressing defendant's motion to dismiss for vindictive prosecution. As a result of this consultation, and with no objection from the government, the defendant provided the court with his Memorandum in Further Support of Motion to Dismiss and exhibits attached thereto supporting his right to discovery and a motion to dismiss on the claim of actual vindictiveness.

The hearing then went forward with the testimony of the only subpoenaed witness who the government authorized to testify: Deputy Marshal James Batey. Because the government refused to produce any of the other seven witnesses defendant had requested, the defendant had no further witnesses. The government called two witnesses who the defendant did not request: Chief Deputy Marshal William Snelson and Deputy Marshal John Hardy.

In defendant's closing arguments, rather than seeking a continuance and moving to compel the testimony of the other seven subpoenaed witnesses, defendant argued that the evidence presented, even without the testimony of the remaining witnesses, was sufficient to establish that the government's prosecution was actually vindictive and that dismissal was thus warranted.

At the conclusion of the lengthy hearing, the court granted defendant's motion to dismiss for

vindictive prosecution based on the evidence presented at the hearing. The court based its decision on (1) government's Exhibit No. 2, the March 14, 2000, memorandum from United States Attorney Josey of the District of South Carolina to United States Attorney Cole of the Eastern District of North Carolina; (2) the testimony of Deputy Marshal James Batey; (3) a finding that the alleged threat to Judge Currie was not credible; and, (4) the timing of the prosecution, which came over a year after defendant's escape and recapture, but only days after his success on appeal. Two weeks after the court's ruling, the government filed the present motion For Reconsideration and to Reopen Hearing.

COURT'S DISCUSSION

I. Motion For Reconsideration

A. Standard of Review

In order to succeed on a Federal Rule of Civil Procedure 59(e) Motion to Alter or Amend Judgment, petitioner must establish that the newly proferred evidence was unavailable at the time of the hearing. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), rev'd on other grounds, 120 S.Ct. 2326, 147 L. Ed. 2d 405 (2000); see also Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). While the court recognizes that the Federal Rules of Civil Procedure are not binding in criminal cases, United States v. Regilio, 669 F.2d 1169, 1177 (7th Cir. 1981) (recognizing that "society's interest in admitting all relevant evidence militates strongly in favor of permitting reconsideration"), the court has a strong

interest in controlling its docket and avoiding piecemeal litigation. Dickerson, 166 F.3d at 679. Thus, when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, the movant must provide a legitimate reason for failing to introduce that evidence prior to the court's ruling. Id.

B. Analysis

Before considering the government's reasons for failing to introduce the newly proferred evidence prior to or during the August 14, 2000, hearing, the court notes that the government was given numerous opportunities to introduce the evidence prior to the evidentiary hearing. According to the record, on August 1, 2000, the court issued an order allowing defendant discovery on his defense of actual vindictiveness. Based on this order, defendant's counsel served a request for documents on Assistant United States Attorney Yvonee Watford McKinney and served subpoenas on (1) J. Rene Josey, the United States Attorney for the District of South Carolina, (2) William Day, Assistant United States Attorney of the District of South Carolina, (3) Deputy U.S. Marshall James Batey of the District of South Carolina, (4) Janice McKenzie Cole, United States Attorney for the Eastern District of North Carolina, (5) John S. Bruce, Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of North Carolina, and (6) Deputy United States Marshal William Butler. In its August 3, 2000, Motion for Protective Order, the government represented to the court that it could not provide any

documents or testimony from Department of Justice employees. On August 2, 2000, the government again, this time in its Motion to Quash the subpoenas, represented that the employees could not testify. Therefore, on no less than three occasions, the government refused to provide the ordered discovery.

Many months and motions after this court ordered that defendant be allowed discovery on his defense of actual vindictiveness, the government filed a Motion for Reconsideration that includes affidavits from the same employees to whom the government has continuously denied access. It is only now, after the court granted defendant's motion to dismiss based on vindictive prosecution, that the government is willing "to present evidence justifying [its] actions . . . in order to rebut what the Court has found to be a prima facie case of vindictive prosecution." (Pl. Mot. for Recons. and Mot. to Reopen Hr'g at 7). This statement itself troubles the court as it suggests that the United States was not willing to (and did not) present evidence justifying its actions at the evidentiary hearing or in prior instances when it had multiple opportunities to do so.

As discussed above, if the evidence forming the basis for a motion for reconsideration is in the movant's possession at the time of the initial hearing, "the movant must provide a legitimate reason for failing to introduce that evidence." United States v. Dickerson, 166 F.3d 667, 679 (4th Cir. 1999), rev'd on other grounds, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). The court in this matter gave the government

ample opportunities to present its evidence. In fact, the court ordered many months ago that it do so. As the Fourth Circuit held in Dickerson, "in light of the ample opportunities the government had to introduce the evidence in question prior to the district court's ruling... its articulated reasons for failing to do so ring hollow." Id. at 679.

Thus, despite ample opportunities, the government has decided to raise new issues subsequent to the court's dismissal of this matter. First, the government contends that it did not expect the court to hear the motion to dismiss for vindictive prosecution at the August 14, 2000, hearing.

However, when the court consulted with the government as to how it should proceed during that hearing, the government agreed not only to put on rebuttal evidence, but also offered its own witnesses who were not subpoenaed by the defendant.

Second, the government contends that the court's ruling in defendant's favor was a result of a discovery sanction against the government for failing to comply with defendant's discovery requests. Although the court disapproves of the government's tactics in choosing who would and would not be allowed to testify, it was not necessary for the court to rule on this issue after it had ordered dismissal on the basis of vindictive prosecution. Based on the record which included all the declarations and documents the government had filed under seal, the exhibits and affidavits the defendant had filed, and the testimony from the lengthy and comprehensive evidentiary hearing, the court concluded that there

was sufficient evidence to demonstrate vindictive prosecution. The court's finding of vindictive prosecution was independent from the court's condemnation of the government's discovery tactics.

The government's Motion For Reconsideration does not raise any new substantive issues. The government had the opportunity on at least three occasions to offer the testimony of various witnesses prior to and during the August 14, 2000, hearing. Yet, at that time and at all times prior to that hearing, the government proceeded without the testimony of the witnesses whose affidavits are attached to the recent Motion for Reconsideration. The government's motion for reconsideration is an attempt to put additional evidence, that should have been admitted at or before the hearing, into the record to support its rebuttal of the court's finding of prima facie vindictive prosecution.

II. Vindictive Prosecution

A. Standard of Review

This court recognizes that the standard of proving the necessary elements of selective prosecution is a demanding one. See United States v. Armstrong, 517 U.S. 456, 463, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). Therefore, this court has proceeded cautiously in embracing the presumption of prosecutorial vindictiveness. See United States v. A.X. Stokes, 124 F.3d 39, 44 (1st Cir. 1997) (citing United States v. Goodwin, 457 U.S. 368, 381, 102 S. Ct. 2485, 2492, 73 L. Ed. 2d 74 (1982)). However, a prosecutor's discretion is subject to constitutional

constraints. See Armstrong, 517 U.S. at 465, 116 S. Ct. at 1480. A "prosecution brought with a vindictive motive, penalizing those who choose to exercise their constitutional rights, [is] patently unconstitutional." North Carolina v. Pearce, 395 U.S. 711, 724, 89 S. Ct. 2072, 2080, 23 L. Ed. 2d 656 (1969) (quoting United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)). Consequently, "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978); see also United States v. Williams, 47 F.3d 658 (4th Cir. 1995) (holding violation of due process to penalize a criminal defendant for pursuing statutory right of appeal).

It is well settled that a federal court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness sufficient to establish a due process violation, or even if a defendant demonstrates a likelihood of vindictiveness sufficient to justify a presumption. See Goodwin, 457 U.S. at 380, 102 S. Ct. at 2492. While most vindictive prosecution cases involve re-indictment of a defendant, the mere filing of an indictment can support a charge of vindictive prosecution. United States v. Hooten, 662 F.2d 628, 634 (9th Cir. 1981).

"To establish a prima facie case for prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1994) (quoting

United States v. Sinigalio, 942 F.2d 581, 584 (9th Cir. 1991)). "Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part." Id. (quoting United States v. Garza-Juarez, 992 F.2d 896, 906 (9th Cir. 1993)). Thus, the proper standard is not whether there is an appearance of vindictiveness, but whether there exists a "realistic likelihood of vindictiveness." United States v. Andrews, 633 F.2d 449, 457 (6th Cir. 1980).

Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that "independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Hooten, 662 F.2d 628, 634 (9th Cir. 1981). A defendant claiming vindictive prosecution must show that (1) the prosecutor harbored animus such that the prosecutor could be considered a "stalking horse," United States v. Aviv, 923 F. Supp. 35, 36 (S.D.N.Y 1996) (citing United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); and (2) he would not have been prosecuted except for the animus. Aviv, 923 F. Supp. at 36 (citing Futernick v. Sumpter Township, 78 F.3d 1051, 1056-57 (6th Cir. 1996)); see also United States v. Koh, 199 F.3d 632, 640 (2d Cir. 1999).

B. Analysis

Thus, based on the above analysis, to succeed on a defense of vindictive prosecution, defendant must prove (1) that the prosecutor "harbored genuine animus toward the defendant"; and (2) that

the defendant would not have been prosecuted except for that unlawful animus. Aviv, 923 F. Supp. at 36 (citing Futernick, 78 F.3d at 1056-57 (6th Cir. 1996)); see also Koh, 199 F.3d at 640.

First, it is clear from the record that it had been well over a year between the time defendant was erroneously released and the time that a decision was made to prosecute this case. During that year no one had shown any interest in prosecuting this case. It is well established that to prosecute a defendant based on the success of an appeal is unconstitutional. See United States v. Williams, 47 F.3d 658 (4th Cir. 1995) (holding violation of due process to penalize a criminal defendant for pursuing statutory right of appeal).

Second, based on evidence presented at the evidentiary hearing, the court does not find the alleged threat to Judge Currie to have been serious or even tenable. Having examined the vast record in this matter, the court cannot find credible evidence that suggests that the defendant poses a serious danger to the community.

Finally, the defendant has provided substantial evidence that the U.S. Attorney in South Carolina prevailed upon the U.S. Attorney in this district to bring the current charges against him. When the memorandum from Deputy Marshal James Batey, which was faxed to the U.S. Attorney's office in South Carolina on March 8, 2000, the day after defendant won his appeal, was not sufficient to spur the U.S. Attorney for the Eastern District of North Carolina to prosecute, the sitting U.S. Attorney in

South Carolina personally requested the sitting U.S. Attorney in this district to prosecute.

In order to establish the second element of a vindictive prosecution claim, defendant must establish that he would not have been prosecuted except for the unlawful animus of the government. Based on the facts set forth above, it is clear and convincing to this court that "but for" defendant's successful appeal and the personal request of the U.S. Attorney in South Carolina, the government would not have prosecuted this matter.

Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that "independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Hooten, 662 F.2d 628, 634 (9th Cir. 1981). In its Motion for Reconsideration, the government explains that it is "willing to open itself up to such scrutiny." Yet, the government does not provide the independent reasons necessary to thwart the presumption of vindictiveness raised by the defendant. Instead the government simply denies the defendant's allegations and provides affidavits from witnesses that it has continually refused to make available for cross examination.

Thus, based on the record which includes all the declarations and documents the government has filed under seal, the exhibits and affidavits the defendant has filed, and the testimony from the lengthy and comprehensive evidentiary hearing, the court finds that there is clear and convincing

evidence that the government engaged in actual vindictive prosecution. This court strongly believes that "[w]hile the Department of Justice has the responsibility to protect the citizens of this nation against those who pose a threat to the safety of the community, it must do so within the reach of the Constitution." Maddox v. Elize, 83 F. Supp. 2d 113 (D.D.C. 1999). The government in this case did not act within our Constitution's reach. Therefore, the government's Motion for Reconsideration and to Reopen Hearing is DENIED.

CONCLUSION

Based on the foregoing analysis, the government's Motion for Reconsideration and to Reopen Hearing is DENIED. The clerk is directed to close this case.

This the 29th day of September, 2000.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, N.C.
#7

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 12, 2001

No. 00-4767
CR-00-79-H
CR-00-70-H

UNITED STATES OF AMERICA

Plaintiff – Appellant

v.

WILEY GENE WILSON

Defendant - Appellee

No. 00-4807
CR-00-70-H

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

WILEY GENE WILSON

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK